

DOCKET FILE COPY ORIGINAL

To whom it may concern:

Please note that the enclosed original document and six copies are for filing with Secretary Dortch. We have enclosed a single copy for Judge Steinberg in a separate envelope. If you have questions, please contact Coleen Lennon at 202-637-8305.

FILED/ACCEPTED

AUG 15 2007

Federal Communications Commission
Office of the Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FILED/ACCEPTED
AUG 15 2007
Federal Communications Commission
Office of the Secretary

In the Matter of)
)
ARKANSAS CABLE TELECOMMUNICATIONS)
ASSOCIATION; COMCAST OF ARKANSAS, INC.;)
BUFORD COMMUNICATIONS I, L.P. d/b/a)
ALLIANCE COMMUNICATIONS NETWORK;)
WEHCO VIDEO, INC.; COXCOM, INC.; and)
CEBRIDGE ACQUISITION, L.P., d/b/a)
SUDDENLINK COMMUNICATIONS,)
)
Complainants,)
)
v.)
)
ENTERGY ARKANSAS, INC.,)
)
Respondent.)
)

EB Docket No. 06-53

EB-05-MD-004

To: Office of the Secretary

Attn: The Honorable Arthur I. Steinberg
Office of the Administrative Law Judge

**COMPLAINANTS' RESPONSE TO ENTERGY ARKANSAS INC.'S MOTION FOR A
PROTECTIVE ORDER**

Pursuant to 47 C.F.R. § 1.294, Complainants respectfully submit this
Response to Respondent Entergy Arkansas Inc.'s Motion for a Protective Order, filed
August 1, 2007 (the "Entergy Motion"). 1/ Complainants have no objection to most of
the requests set forth in the Entergy Motion. Complainants, however, wish to clarify the
scope of one request and to correct several misimpressions created by that Motion.

1/ Last week, Complainants moved for an extension of time through August 15 to
file this response. See Motion for an Extension of Time to File Response to Entergy's
Motion for a Protective Order, filed August 7, 2007. Entergy consented to the
extension of time.

No. of Copies rec'd 046
List ABCDE

STATEMENT OF FACTS

The Entergy Motion was triggered by Complainants' Motion to Compel *Utility Support Systems, Inc.'s Compliance With Subpoena Duces Tecum*, filed July 9, 2007 ("Motion to Compel"). In the Motion to Compel, Complainants explained why purportedly privileged documents possessed by third party Utility Support Systems ("USS") were not in fact privileged and asked that the Hearing Officer order USS to produce them for *in camera* inspection. See Motion to Compel at 3. Complainants noted that any purported privilege attaching to the documents belonged not to USS but to Entergy, and that Entergy had not to that point indicated any intent to assert any privilege. See *id.* at 17. When Complainants sent the Commission and USS an electronic copy of this Motion to Compel, they copied Entergy's counsel, as Entergy admits. See Entergy Motion at 4 & n.3. Complainants also copied Entergy's counsel on the correspondence between Complainants and USS that led to the Motion to Compel. See Motion to Compel at 17.

ARGUMENT

In the wake of Complainants' Motion to Compel, Entergy filed its Motion. Entergy sought the following relief: (1) an order that the production by USS of any "covered documents" be prohibited unless and until Entergy has had a "full and fair opportunity" to assert any privilege claims; (2) a stay of consideration of any "claims or challenges regarding privilege" until 14 days after the parties have exchanged privilege logs; 2/ and (3) an order that copies of all "filings, pleadings, motions, requests for action from the ALJ (other than requests for the issuance of subpoenas), or any other submissions" in

2/ The privilege log exchange date has been extended to August 17.

this proceeding be served on all parties. See Entergy Motion at 1-2. Complainants *have no objection to Requests No. 2 and 3. Complainants are in general agreement with the thrust of Request No. 1 as well, but they seek to clarify the request's scope. Complainants also briefly address Entergy's baseless contention that Complainants have somehow tried to prejudice Entergy through their interactions with USS.*

Request No. 1: Entergy in its Motion defines "covered documents" as "certain documents currently in the custody of [USS] for which a claim of privilege has been or may be asserted," and it asks that the Hearing Officer prohibit disclosure of covered documents until Entergy has had a full opportunity to assert any privilege or other claims to which it is entitled. See Entergy Motion at 1. Complainants agree, of course, that Entergy should have the opportunity to assert privileges where warranted. However, Complainants are concerned that Entergy's broad definition of "covered documents" could justify a procedure wherein Entergy seeks to review *all* of USS' additional responsive documents prior to their release to Complainants. There is no justification for such a procedure, which has not been followed with regard to any other third-party subpoenas in this case. Complainants therefore suggest that to the extent the Hearing Officer thinks an order necessary as to Entergy Request No. 1, he limit its scope to documents that USS has identified as potentially privileged.

Entergy's other accusations: Entergy suggests throughout its Motion that Complainants, in their communications with USS and their Motion to Compel documents from USS, somehow attempted to go behind Entergy's back and seek Entergy's privileged documents without its knowledge. See Entergy Motion at 4-7. To this end, Entergy repeats over and over again that Complainants did not serve it with a

hard-copy version of the Motion to Compel. See, e.g., *id.* at 4 & n.3; *id.* at 6. The suggestion of impropriety here is entirely baseless. As Entergy itself admits, Complainants sent Entergy a PDF of the Motion to Compel via email, thus alerting Entergy to the privilege dispute and the fact that the purported privilege at issue was Entergy's to assert. See *id.* at 4 n.3; *id.* at 5. Complainants also copied Entergy on the earlier correspondence between Complainants and USS regarding the same issues. See Motion to Compel at 17. Entergy, in short, was in possession of all relevant information concerning this matter. And, of course, there is no requirement in the rules that any party other than the recipient of the subpoena be served. See generally 47 C.F.R. § 1.331 *et seq.* Entergy's assertion that "Complainants' Actions Threaten To Deny [Entergy's] Right to Assert Claims of Privilege," see Entergy Motion at 4, is therefore inaccurate. Complainants kept Entergy abreast of events and did not cause Entergy the slightest prejudice.

Furthermore, Entergy suggests that Complainants should have conferred with Entergy before filing the Motion to Compel against USS, and that because Complainants did not do so they must be trying to "intentionally deny [Entergy] its rightful opportunity" to assert privilege claims. See Entergy Motion at 6. This is not correct either. First, Complainants were not required to confer with Entergy before filing a Motion to Compel against USS, a third party. Second, Complainants did not ask that the purportedly privileged documents be handed directly to Complainants, but only that the Hearing Officer review them *in camera*; it is difficult to imagine how this procedure could have denied Entergy its rights. Third, it is no secret that Entergy and USS have been in communication throughout this case regarding these and other discovery issues;

USS' unqualified support of Entergy's Motion is but one example. See Utility Support Systems, Inc.'s Consent to Entergy Arkansas, Inc.'s Motion for Protective Order, filed August 3, 2007. And fourth, it bears repeating that Complainants copied Entergy on the Motion to Compel and all related correspondence, thus ensuring that Entergy would have the chance to weigh in with any privilege claims. Entergy's suggestion that Complainants were hiding the ball here is simply unwarranted.

CONCLUSION

For the reasons described above, Complainants are entitled to all relief requested herein.

Respectfully submitted,

ARKANSAS CABLE TELECOMMUNICATIONS
ASSOCIATION; COMCAST OF ARKANSAS, INC.;
BUFORD COMMUNICATIONS I., L.P. D/B/A ALLIANCE
COMMUNICATIONS NETWORK; WEHCO VIDEO, INC.;
COXCOM, INC.; AND CEBRIDGE ACQUISITION, L.P.,
D/B/A SUDDENLINK COMMUNICATIONS



J. D. Thomas
Paul A. Werner, III
Dominic F. Perella
Hogan & Hartson L.L.P.
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
jdthomas@hhlaw.com
pawerner@hhlaw.com
dfperella@hhlaw.com

August 15, 2007

Its Attorneys

CERTIFICATE OF SERVICE

I, Dominic F. Perella, hereby certify that on August 15, 2007, a copy of the foregoing **COMPLAINANTS' RESPONSE TO ENTERGY ARKANSAS INC.'S MOTION FOR A PROTECTIVE ORDER** was hand-delivered, and/or placed in the United States mail, and/or sent via electronic mail, postage prepaid, to:

Marlene H. Dortch (Orig. & 6 copies)
Secretary, Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

The Honorable Arthur I. Steinberg **
Administrative Law Judge
Office of the Administrative Law Judge
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Wm. Webster Darling, Esquire (overnight delivery) **
Entergy Services, Inc.
425 W. Capitol Avenue
P.O. Box 551
Little Rock, Arkansas 72203

Shirley S. Fujimoto, Esquire **
David D. Rines, Esquire
McDermott Will and Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005

Gordon S. Rather, Jr. (overnight delivery) **
Stephen R. Lancaster (overnight delivery)**
Michelle M. Kaemmerling
Wright, Lindsey & Jennings LLP
200 West Capitol Avenue
Suite 2300
Little Rock, AR 72201-3699

Raymond A. Kowalski**
Eric J. Schwalb
Troutman Sanders
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004

Alex Starr**
Lisa Saks
Michael Engel
Federal Communications Commission
Enforcement Bureau, Market Disputes Division
445 Twelfth Street, S. W.
Washington, D. C. 20554



Dominic F. Perella

** Also served via Electronic Mail